Supreme Court, U.S.
OCT 23

NO. 01-430

IN THE SUPREME COURT
OF THE UNITED STATES
October Term, 2001

DEPUTY PAUL THRASH,

Petitioner/Appellee,

v.

HERBERT GULLIFORD,

Respondent/Appellant

On Petition for Writ of Certiorari
To the United States Court of Appeals
For the Ninth Circuit

REPLY TO BRIEF IN OPPOSITION

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I. RESPONDENT'S STATEMENT OF CASE UNHELPFUL

In setting out his differing "statement of the case," respondent Gulliford not only fails to disclose what "difference" his version makes but also asks the Court to accept his mere characterizations of facts rather than provide any part of the actual record. See e.g. Br. In Opp., at 2-5, 17, 19. On the other hand, respondent dismisses Deputy Thrash's ample evidentiary support by arguing such are "snippets of testimony" and "wisps of transcripts" that in some unexplained way "are misleading and obviously incomplete." Id. at p. 19 n. 11. Respondent's exclusive reliance on characterizations rather than the record concedes that if the record is actually examined it can only be concluded -- as did two juries, two district court judges and the dissenting Ninth Circuit judge in the case below -- that "probable cause to arrest could properly have been found based on Gulliford's failure to disperse . . . ."[1] Gulliford v. Thrash,

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[1] Indeed, even the Ninth Circuit majority here never denied the presence of probable cause for failure to disperse, but simply ignored its presence by misapplying the "law of

2001 WL 427285 * 3 (9th Cir. Apr. 25, 2001)(Fisher, J., dissenting).

II. REASONS WHY CERTIORARI IS APPROPRIATE

A. Qualified Immunity Warrants Grant of Petition

Respondent does not dispute that the Ninth Circuit majority rejected petitioner's claim of qualified immunity on the ground he had waived it by failing to cross appeal his own successful defense verdict. Gulliford v. Pierce County, 136 F.3d 1345, 1351 (9th Cir. 1998). Respondent does not contest that in contrast this Court holds as an "inveterate and certain" rule, Massachusetts Mut. Life Ins. Co. v. Ludwig, 426 U.S. 479, 480, 48 L.Ed.2d 784, 96 S.Ct. 2158 (1976), that an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." Id. (quot-

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the case doctrine." See Pet. at 20-23; Gulliford v. Thrash, 2001 WL 427285 * 3 (9th Cir. Apr. 25, 2001).

ing United States v. American Railway Express Co., 265 U.S. 425, 435, 68 L.Ed. 1087, 44 S.Ct. 560 (1924))(emphasis added). See also First English Evangelical Lutheran Church of Glendale v. Los Angeles County, Cal., 482 U.S. 304, 325 n. 3, 96 L.Ed.2d 250, 107 S.Ct. 2378 (1987); McGoldrick v. Compagnie Generale, 309 U.S. 430, 434, 84 L.Ed. 849, 60 S.Ct. 670 (1940).

Indeed, plaintiff expressly acknowledges that the Ninth Circuit majority's opinion in this case also is in conflict with decisions of other United States court of appeals on the same important matter. Br. In Opp., at 10-11. See also Powell v. Schriver, 175 F.3d 107, 113 (2nd Cir. 1999)(second circuit holds where "judgment entered was entirely in [the officer's] favor," an "appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it."); Sims v. Mulchahy, 902 F.2d 524, 545 (7th

Cir.), cert. denied, 498 U.S. 897 (1990)(quoting Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 439 (7th Cir. 1987), cert. dismissed 485 U.S. 901 (1988))(seventh circuit holds it "improper and unnecessary" for prevailing officer to cross appeal his defense verdict because "[c]ross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary.") Rather, respondent argues the qualified immunity "issue is moot" because "this Court has already reviewed the decision in Gulliford I and denied certiorari, and secondly, the right allegedly violated in this case was . . . clearly established . . . ." Br. In Opp., at 11.

As to the denial of certiorari after the Ninth Circuit majority's first reversal, it is a well "settled proposition that this Court's denial of certiorari does not constitute a ruling on the merits," Barber v. Tennessee, 513 U.S. 1184, 130 L.Ed.2d 1139, 115 S.Ct. 1177 (1995)(citing United States v. Carver, 260 U.S. 482, 490, 43 S.Ct. 181, 67 L.Ed. 361 (1923)), and as one authority has noted in criticizing Gulliford -- where quali-

fied immunity "was properly preserved at the first trial, . . ., it would remain open at the new trial." See 15A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 3904 n. 14 (supp. 2001). Further, the denial of certiorari "is discretionary and depends on numerous factors other than the perceived correctness of the judgment we are asked to review," Ross v. Moffitt, 417 U.S. 600, 616-17 (1974), so that a lack of finality may "of itself alone" furnish "sufficient ground for the denial of the application." Hamilton-Brown Shoe Co. V. Wolf Bros. & Co., 240 U.S. 251, 258 (1916). See also Locomotive Firemen v. Bangor & Aroostock R. Co., 389 U.S. 327, 328 (1967)(denying certiorari "because the Court of Appeals remanded the case [and thus it] is not ripe for review by this Court.") Here, the Ninth Circuit's first reversal "remand[ed] for a new trial on this claim" of unlawful arrest, see 136 F.3d at 1350, but now that same majority rules that a "directed verdict should have been granted" leaving no issue of liability to be decided. See 2001 WL 427285 * 3. Finally, as respondent

notes, the second circuit's conflicting decision in Powell v. Schriver "was decided six months after certiorari was denied," Br. In Opp., at 10, and this Court will deny certiorari but then grant it later when -- as here -- a conflict between circuits subsequently arises. See e.g. Skidmore v. Swift & Co., 320 U.S. 763 (1943)(cert. denied), 322 U.S. 723 (denial vacated and certiorari granted), 323 U.S. 134 (1944)(reversal of lower court decision.)

Second, as to the merits of qualified immunity here, respondent does not contest that the applicability of state precedent for qualified immunity has yet to be decided and petitioner well documents how the Ninth Circuit here ignored both federal precedent as well as the more pertinent precedent of the deputy's state court. See Pet., at 11-19. Respondent's discussion of petitioner's cited federal and state precedent (Br. In Opp., at 13-16) neither fairly distinguishes those cases[2] nor

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[2] For example, respondent argues that in State v. LaLonde, 35 Wn.App. 54, 665 P.2d 421 (1983) "officers had already been physically attacked twice by other party-goers"

justifies the Ninth Circuit's refusal even to consider them rather than inadequately "assert[] that a general right [defendant] was alleged to have violated . . . was clearly established." Compare Anderson v. Creighton, 483 U.S. 635, 640-41, 97 L. Ed.2d 523, 107 S.Ct. 3034 (1987) with 136 F.3d at 1351.

Hence, qualified immunity is not "moot" and a writ of certiorari is appropriate because the Ninth Circuit not only "has entered a decision in conflict with the decision of another United States court of appeals on the same important matter," but

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and "LaLonde persisted in physically appraoaching the officers, was repeatedly told to get back, was physically pushed back, and when he physically approached again, was arrested." Br. In Opp., at 13. Here, too, the lives of officials and citizens repeatedly had been threatened by other party-goers, 136 F.3d at 1347; App. M at 1-2, 4-8; App. Q at 2-3; App. T at 1-2, the crowd of which Gulliford was a member repeatedly had been ordered to go home, 136 F.3d at 1347; App. I at 2-4; App. J at 2-3; App. K at 2-5, 7-9, App. M at 4-9; App. N at 1-2, 5; App. P at 2-3, 6-11; App. Q at 3-4; App. R at 1-2; App. S at 1, and Gulliford nevertheless persisted both in physically remaining and in verbally making clear to the officers his intent to remain despite their lawful orders. 136 F.3d at 1347; App. I at 3; App. M at 10-17; App. N at 7; App. O at 1-3; App. P at 3-5; App. Q at 4-5; App. R at 3-4; App. S at 2; App. T at 2, 5-6.

"has decided an important question in a way that conflicts with relevant decisions of this Court." See S.Ct. Rule 10(a) and (c).

B. Assumption of Jury Role Warrants Certiorari

Petitioner somehow asserts the question of the Ninth Circuit majority's preemption of the previous and any future jury by directing liability somehow was addressed by this Court and in any case was warranted. Br. In Opp., at 16-21. However, apart from the fact that this Court's previous denial of certiorari under different circumstances was not a ruling on the merits, see Carver, 260 U.S. at 490, the Ninth Circuit majority in its first reversal had not ordered a directed verdict nor addressed the "law of the case" doctrine and therefore those issues obviously were not previously capable of being raised to or decided by this Court.

Further, as to the Ninth Circuit majority's directing of a verdict on the ground there was no probable cause to arrest, respondent provides nothing to dispute such impropriety other than his characterization of evidence that he conveniently

chooses not to present to the Court. Indeed, respondent ignores that two juries, two district court judges and a member of the circuit court's own panel concluded from the entire record that under the evidence at trial "probable cause to arrest could properly have been found based on Gulliford's failure to disperse . . . ." 2001 WL 427285 * 3 (Fisher, J., dissenting). Nowhere does respondent address the basic issue that the Ninth Circuit in Gulliford, and thereafter in reliance on Gulliford, "has arrogated to itself the making of [the] finding" of the "quintessential factual inquiry" of whether words and expressive conduct under the circumstances are accompanied by illegal acts or are themselves true threats. See United States v. Poocha, 2001 WL 880848 * 7 (Aug. 7, 2001)(Tashima, J., dissenting).

Hence respondents have done nothing to dispute that the manner in which the Ninth Circuit majority directed liability against Deputy Thrash so far departs from the accepted and usual course of judicial proceedings -- and continues to be used

to justify similar departures in other cases -- as to call for an exercise of this Court's supervisory power. See S.Ct. Rule 10 (c).

III. CONCLUSION

Respondent accentuates the vacuity of his opposition by his unfortunate and baseless resort to accusing petitioner of "misstat[ing] the facts of this case in order to manufacture a question which may be of interest to this Court," and of "bravado in attempting to trick this Court into rehearing a petition for writ of certiorari which it denied three years ago." Br. In Opp., at 17 & 21. Any review of the law and record however not only quickly refutes such inappropriate and intemperate rhetoric, but justifies this Court in granting certiorari to remedy the Ninth Circuit's demonstrated errors concerning important federal questions and to avoid an improper appellate imposition of personal liability upon this police officer -- and other officers in the future -- whom two juries, two district court

judges and a circuit court judge have all found lawfully performed his duty.

DATED THIS 19th DAY OF OCTOBER, 2001.

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